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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRISTOPHER W., a Person
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

HERBERT H.,

Defendant and Appellant.

D050050

(Super. Ct. No. EJ2475A)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Referee. Affirmed.

Herbert H. appeals a judgment terminating his parental rights to his son, Christopher W. He contends removing Christopher from his care under Welfare and Institutions Code section 388 violated his rights to due process because the removal required the procedures and safeguards of section 387. (All statutory references are to the Welfare and Institutions Code.) He also asserts the court erred in not finding the

exception to adoption of section 366.26, subdivision (c)(1)(A) applied to this case. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Three-year-old Christopher became a dependent child of the juvenile court in August 2004 when sheriff deputies, who were searching for Herbert to arrest him on a felony warrant, found Christopher sleeping alone in a filthy home. The juvenile court assumed jurisdiction and ordered Herbert to comply with his reunification services plan. Christopher was placed with his paternal grandmother (the grandmother).

Herbert had a criminal history and a long-term drug addiction. He entered residential drug treatment and complied with other elements of his services plan. In November 2005, after Herbert graduated from residential treatment, the court placed Christopher with him. However, after Christopher was returned, Herbert stopped participating in his case plan. He had two positive methamphetamine tests, one in February and one in March 2006.

On May 11, 2006, Christopher's attorney filed a section 388 petition seeking Christopher's removal from Herbert's care. He alleged Herbert was required to leave his sober living residence, had two positive drug tests and was not drug testing or participating in other services. The San Diego County Health and Human Services Agency (the Agency) had earlier recommended Christopher stay in Herbert's care with family maintenance services, but the social worker changed the recommendation to propose setting a section 366.26 hearing and returning Christopher to the grandmother's care.

After a hearing on the section 388 petition, the court found Herbert's relapse and unwillingness to address it constituted a changed circumstance and removal was in Christopher's best interests. It removed him from Herbert's care and set a section 366.26 hearing. Herbert petitioned for review of the court's orders. This court denied his petition on its merits. (*Herbert H. v. Superior Court* (September 19, 2006, D048776) [nonpub. opn.])

The social worker recommended a permanent plan of adoption. She reported that during visits Herbert acted appropriately and Christopher was happy to see him, but he separated easily from Herbert when visits ended. The social worker opined Christopher was very bonded with the grandmother and relied on her to meet his needs. She was willing to adopt him.

The psychologist who conducted a bonding study opined Herbert and Christopher's relationship was not a primary attachment. The psychologist could not determine how Christopher would react if parental rights were terminated, but said the effect could be lessened because the grandmother was Christopher's caregiver. He recommended Christopher have therapy.

At the section 366.26 hearing, the social worker opined that although Christopher and Herbert had appropriate visits together and they had a parent-child relationship, Herbert could not be Christopher's daily caregiver because of his substance abuse. She said Christopher said he wanted to live with the grandmother, but wanted Herbert to be there too. She did not think it would be detrimental to Christopher to terminate Herbert's

parental rights, and the grandmother said she would continue their contact and would allow Herbert to visit if he were sober and polite.

The court found Christopher to be adoptable and none of the exceptions of section 366.26, subdivision (c)(1) applied. It terminated parental rights and referred the case for adoption.

DISCUSSION

I

Herbert contends the court denied him due process by removing Christopher from his care on the basis of a section 388 petition when a section 387 petition was required. He argues he was prejudiced because the court did not hold a bifurcated hearing or make findings by clear and convincing evidence.

Herbert may not raise this issue because arguments that involve alleged errors at a hearing which resulted in referral to a section 366.26 hearing must be raised by a petition for an extraordinary writ. (California Rules of Court, rule 8.452.) The filing of a writ petition is required for review of all orders at such hearing "regardless of their nature." (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1019.) Herbert filed a petition for writ review regarding Christopher's removal from his care and the setting of a section 366.26 hearing. This court heard and denied his petition on its merits. (*Herbert H. v. Superior Court, supra*, D048776) Herbert forfeited any further argument regarding alleged errors at that hearing by not raising them in his writ petition.

II

Herbert also asserts the court reversibly erred by deciding the beneficial relationship exception to adoption of section 366.26, subdivision (c)(1)(A) did not apply. He argues he maintained regular visitation and contact and there was substantial evidence Christopher would benefit from continuing their relationship.

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parents' burden to show termination of parental rights would be detrimental because one of the specified exceptions of section 366.26, subdivision (c)(1) exists. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 574.) Under the exception in subdivision (c)(1)(A), the parent must show termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the exception of section 366.26, subdivision (c)(1)(A)]."

In *In re Autumn H., supra*, 27 Cal.App.4th, at pp. 575-577, this court found substantial evidence to support an order terminating parental rights. This court stated:

"In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Id.* at p. 575.)

In reviewing whether sufficient evidence supports the trial court's finding the appellate court reviews the evidence in the light most favorable to the court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Id.* at p. 576.)

Substantial evidence supports the juvenile court's finding the beneficial relationship exception did not apply. Herbert maintained regular visitation and contact with Christopher. However, he did not show their relationship was so beneficial that it would outweigh the benefit Christopher would gain from the permanency of an adoptive home.

By all accounts, Herbert and Christopher had loving, appropriate visits. Herbert played with Christopher, and Christopher enjoyed their interaction. However, the psychologist who conducted the bonding study found their attachment did not rise to the level of a primary attachment. Herbert was tearful when having to leave Christopher, but Christopher separated from Herbert without distress. The psychologist said the effects on Christopher of termination of Herbert's parental rights might be lessened because Christopher was doing well in the grandmother's home. Substantial evidence supports the finding the section 366.26, subdivision (c)(1)(A) exception to adoption did not apply.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.